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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. .....

HUBERT STILL, ET AL,
Petitioners,

v.

ROSSVILLE CRUSHED STONE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 29, 1966.

OPINIONS BELOW

The District Court rendered a written opinion; however, it is not reported (Appendix A). The opinion of the United States Court of Appeals for the Sixth Circuit was filed on December 29, 1966, and has not as of this date been reported in the official or unofficial reports (Appendix B).

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered on December 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the United States District Court sitting in Tennessee can dismiss suits filed against a Tennessee corporation for money damages and to enjoin a nuisance for injury to land for the reason that petitioners' land is located in the Sister State of Georgia?

CONSTITUTIONAL PROVISIONS

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." 28 U.S.C., Article IV, §1, U. S. Constitution.

STATUTES INVOLVED

"A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C., §1391(a).

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between——

(1) citizens of different States;

* * *

"For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . ." 28 U.S.C., §1332(a)(1) and (c).

FEDERAL RULES OF CIVIL PROCEDURE

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45." 28 U.S.C., Federal Rules of Civil Procedure, 4(f).

"Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." 28 U.S.C., Federal Rules of Civil Procedure, 4(d)(3).

STATEMENT OF THE CASE

Suit was filed by petitioners, who are Georgia residents and landowners, in the United States District Court sitting in Tennessee, Eastern District, Southern Division,

against a Tennessee Corporation. Federal Jurisdiction was invoked under 28 U.S.C., §1332(a)(1) and (c) because of the complete diversity of citizenship between the parties, petitioners and defendant, and because the amount claimed was in excess of TEN THOUSAND (10,000) DOLLARS.

Petitioners alleged damage resulted to their respective homes from the defendant's blasting operation conducted within a nearby rock quarry, also located in Georgia, which had been leased by the defendant corporation. In addition to money damages, petitioners also sought to enjoin a nuisance created by the defendant's activities within its leased quarry.

The Honorable District Court dismissed the case upon defendant's motion for the reason that " . . . the law of the forum governs because the question is jurisdictional rather than simply venue." The Court further stated ". . . the *Erie* doctrine (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)), governs the question" and "that the law of Tennessee governs the action of this Court in this case and that the law in Tennessee is that there is no jurisdiction in any court sitting in Tennessee to award damages for injury to real estate or to issue an injunction to prevent such injury where the real estate is situated in another state."

An appeal was properly perfected, and the Sixth Circuit of the United States Court of Appeals at Cincinnati sustained the order of the District Court dismissing the case; however, in the opinion of that Honorable Appellate Court, petitioners' contention "that no state by legislative action or judicial determination can destroy jurisdiction established by Congress or the Constitution" was duly noted and resolved by the Court stating that there exists

a "distinction between jurisdiction and venue." It, therefore, appears that the Honorable Court of Appeals determined that the problem was one of venue rather than jurisdiction.

REASONS FOR GRANTING WRIT

I

THE DECISION OF THE UNITED STATES DISTRICT COURT AFFIRMED BY THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND VARIOUS DECISIONS OF THIS COURT WHEREIN THE ISSUE INVOLVED WAS DETERMINED ARE ALSO IN CONFLICT.

The question of whether the United States District Court sitting in Tennessee must entertain a suit against a Tennessee corporation to enjoin a nuisance and for money damages arising out of injury to the petitioners' land located in the Sister State of Georgia where there is a complete diversity of citizenship and the requisite jurisdictional amount is present is not completely new to this Court. This Court decided in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895), that such a suit could not be maintained within a state other than where the land was located. The exclusionary rule laid down in the *Ellenwood v. Marietta Chair Co.*, *supra*, case was modified or distinguished in *Stone v. United States*, 167 U.S. 178 (1897), the Court holding that since the injury to the government land located in a Sister State consisted of cutting and hauling away trees, the cause of action was for the conversion of personal property rather than injury to land; therefore, jurisdiction was present.

In *Wetmore v. Tennessee Copper Co.*, 218 U.S. 369

(1910) (the opinion in *Ladew v. Tennessee Copper Co.*, 218 U.S. 365 (1910) being adopted), the Court held without reference to either *Stone v. United States*, *supra*, or *Ellenwood v. Marietta Chair Co.*, *supra*, that an action was improperly brought in a United States District Court sitting in the State of Tennessee where the relief sought was to enjoin a nuisance arising out of injury to land *also located in the State of Tennessee* (emphasis added) insomuch as the defendant was a non-resident corporation. The Court determined that the action was *in personam* and would have to be brought (if it could be brought at all) in the state where the defendant corporation could be personally served with process. Therefore, it would appear that this important question should be determined by the United States Supreme Court since the decision in the *Wetmore* case is in conflict with the decision in the *Ellenwood* case.

II

THE DECISION PRODUCES THE INJUSTICE OF A CLEAR RIGHT WITHOUT A REMEDY.

The exclusionary rule had its origin in the United States and in the Federal Courts in *Livingston v. Jefferson*, 15 F. Cases 660 (1811). Suit was commenced against ex-President of the United States, Thomas Jefferson, in a United States Court sitting in Virginia by a Louisiana landowner seeking money damages for trespass to the land. Justice John Marshall wrote a concurring opinion which has found fame in textbooks and judicial decisions because of the criticism of the exclusionary rule.

". . . where the remedy is against the person and can be afforded by the court, I have not yet discerned

a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it."

* * *

". . . One of the greatest judges who ever sat on any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction, between taking jurisdiction in cases of contract respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of *Mostyn v. Fabrigas*, 1 Cowp. 166, Lord Mansfield stated the true distinction between proceedings which are *in rem*, in which the effect of a judgment cannot be had unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local. It may be termed an *obiter dictum*. *** In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight . . . . Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction, which produces the inconvenience of a clear right without a remedy." *Livingston v. Jefferson*, *supra*, pp. 664, 665.

The United States Supreme Court also observed the criticism voiced by Justice John Marshall and Lord Mansfield that the exclusionary rule produces the inconvenience of a clear right without a remedy.

> ". . . If a suit like this cannot be maintained, then persons depredating on the public lands may escape civil liability by simply removing from the State in which the depredation occurred . . ." *Stone v. United States*, *supra*, p. 183.

The inconvenience of a clear right without a remedy is present in the case under consideration. If the suit were brought in a United States District Court in the State of Georgia, service of process could only be perfected on the defendant, a Tennessee corporation, by personal service if it has and retains an agent within the State of Georgia upon whom service of process can by the laws of that State or of the United States be lawfully perfected.

> "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held . . ." 28 U.S.C., Federal Rules of Civil Procedure, 4(f).

> "Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." 28 U.S.C., Federal Rules of Civil Procedure, 4(d)(3).

There is no proof in the record that such an agent exists within the State of Georgia or if one does exist will remain there or that the Georgia Legislature has seen fit to provide for constructive service of process upon a foreign corporation where it has committed an act of trespass upon lands within that State, and, as a matter of fact, an identical action was commenced in the very county of Georgia where the injured land was located, but the Court nevertheless dismissed the suit because it had not been alleged within the complaint filed that the defendant, a foreign corporation, (as a matter of fact, the same defendant in this case) had an agent within the county upon whom service of process could be perfected. *Rossville Crushed Stone v. Massey*, 219 Ga. 467, 133 S.E. 2d 874 (1963).

III

THE DECISION ENABLES THE STATE BY STATUTE AND/OR JUDICIAL DECISION TO DETERMINE THE JURISDICTION OF THE UNITED STATES DISTRICT COURT IN DEROGATION WITH ACTS OF CONGRESS WHICH IS EXPRESSLY PROHIBITED BY DECISION OF THIS COURT.

Another compelling reason why this issue should be determined is that Congress has granted jurisdiction to the United States District Courts where all the plaintiffs and all the defendants are "citizens of different states," 28 U.S.C., §1332, *supra*, and has fixed venue in the following manner: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C., §1391(a). This Court has held

that jurisdiction of the United States District Court *is not and cannot* be controlled by the law of the State where the District Court is located under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 817.

> "Whether or not Illinois may validly close her own courts to litigation of this kind, Illinois most assuredly cannot prescribe the subject matter jurisdiction of federal courts even when they sit in that State."
>
> * * *
>
> "It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable 'rule of decision' under this statute, when Congress in passing the federal jurisdictional grant has specifically 'otherwise required and provided.' 28 U.S.C., §1332(a)(1), 28 U.S.C.A., §1332(a)(1). The petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States." *First Nat. Bank of Chicago v. United Air Lines*, 342 U.S. 396, 72 S. Ct. 421, pp. 422, 423 (1952).

It appears that the Circuit Court of Appeals determined that this matter involved venue rather than jurisdiction; however, with all due respect to that Honorable Court, it does not appear in any decision of the various State Courts, United States District Courts, Circuit Courts of Appeals or the United States Supreme Court where different states were involved that this matter has ever been labeled venue rather than jurisdiction. *Brown v. Dayton C. & I. Co.*, 3 Tenn. Ct. of Civil Appeals 395 (1912); *Ducktown Sulphur, Copper & Iron Co. v. Barnes*, 60 S.W. 593 (1900); *Ellenwood v. Marietta Chair Co.*, *supra*; *Huntington v. Attrill*, 146 U.S. 657 (1892); *Little v. Chicago, St. Paul, Minneapolis & Omaha Rail-*

way Co., 65 Minn. 48, 67 N.W. 846 (1896); *Livingston v. Jefferson*, *supra*; *McCormick v. Dave L. Brown*, 201 Tenn. 166, 297 S.W. 2d 91 (1956); *Mattix v. W. W. Swepston*, 127 Tenn. 693 (1913); *Mostyn v. Fabrigas*, *supra*; *Potomac Milling & Ice Co. v. Baltimore & Ohio Railroad Co.*, 217 F. 668 (1914), *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W. 2d 994 (1952); *Stone v. United States*, *supra*; *Wetmore v. Tennessee Copper Co.*, *supra*.

I think whether the issue involved is venue or jurisdiction is very simply resolved by a practical application of the distinction set forth in the opinion of the Honorable Court of Appeals.

> "Jurisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, is intended for the convenience of the litigants. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)." OPINION, December 29, 1966, p. 2.

The United States District Court in Tennessee has the power to adjudicate over the defendant, a Tennessee corporation; however, a United States District Court in the State of Georgia may not have power to adjudicate over the Tennessee corporation. The action is *in personam*; therefore, it is not merely a question of whether it would be more convenient for the litigants to have the case tried in the State of Georgia or in the State of Tennessee but whether one Court has the power, and the other Court does not have the power.

> "Historically the jurisdiction of the Court to render judgment *in personam* is grounded on their *de facto* power over the defendant's person." *International Shoe Company v. State of Washington*, 326 U.S. 763,

66 S. Ct. 145 (1945) at 158.

IV

THE DECISION IS IN VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

The last, but far from the least, more compelling reason why this Court should determine the question involved in this case is that a denial of jurisdiction by the United States District Court is in violation of the full faith and credit clause of Article IV, Section 1 of the United States Constitution.

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." 28 U.S.C.

In *Hughes v. Fetter*, 341 U.S. 609, 71 S. Ct. 98 (1951), suit was brought in a State Court in Wisconsin for a wrongful death which occurred in Illinois. Wisconsin prohibited by statute such actions unless they arose within the State. This Court held:

> "'Full Faith and Credit shall be given in each State to the public Acts * * * of every other State.' It is also settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy

to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.

"We hold that Wisconsin's policy must give way." *Hughes v. Fetter, supra*, p. 982.

This Court thereafter determined that the principles of *Hughes v. Fetter, supra*, are applicable if the suit is brought in the United States District Court, and stated further that the decision is not altered by the fact that the Sister State may also have jurisdiction.

"The Illinois statute before us today is the exact duplicate of the Wisconsin statute with the single exception that suit is permitted in Illinois under another state's wrongful death statute if service of process cannot be had on the defendant in the state where the death was brought about. That Illinois is willing for its courts to try some out-of-state death actions is no reason for its refusal to grant full faith and credit as to others. The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois. This is true although Illinois agrees to

try cases where service cannot be obtained in another state." *First National Bank of Chicago v. United Air Lines, Inc., supra*, p. 422.

This Court recognized the "inconvenience of a clear right without a remedy."

> "We also think it relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant. And while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service, in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state." *Hughes v. Fetter, supra*, p. 983.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOE TIMBERLAKE,
1215 Hamilton Nat'l Bank Building,
Chattanooga, Tennessee 37402,

Attorney for Petitioners.

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

Civil Action No. 4459

HUBERT STILL and DENA STILL, KENNETH R. MINK and SHARON P. MINK, WILLIAM E. BURNETTE and VICKY BURNETTE, MATHEW C. CLEMONS and ALVERTA L. CLEMONS, ERNEST C. MIDDLEBROOKS, JR. and ELIZABETH E. MIDDLEBROOKS, ROBERT W. FINK, JAMES A. KEITH and JIMMIE LOU KEITH, JOHN R. WOOTEN and JANET D. WOOTEN, MILDRED HULGAN, WILLIAM D. MOORE and ETHEL M. MOORE, LEE GIBSON and PATRICIA GIBSON, ROBERT L. BEARD and LOIS E. PEVEHOUSE, WILLIAM R. WALDROP, WEBB R. BARHAM, JOSEPH T. TUCKER, JOHN H. McCORMICK and MARGUERITE McCORMICK, IRENE NICHOLS GREEN, MILDRED R. CHAPMAN, RANDALL STILL, PLEZZIE T. GREEN

v.

ROSSVILLE CRUSHED STONE CO., A corporation incorporated under the laws of the State of Tennessee

MEMORANDUM ON MOTION TO DISMISS

(Filed May 14, 1965)

The plaintiffs own lots on which are situated dwelling houses in Rossville, Walker County, Georgia. The de-

fendant is a Tennessee corporation with its principal place of business located in Chattanooga, Hamilton County, Tennessee. Jurisdiction is based upon diversity of citizenship.

The defendant has interposed a motion to dismiss, the principal ground being that this is a tort action praying for an injunction concerning plaintiffs' Georgia real estate; thus rendering this a local action over which this federal court sitting in Tennessee has no jurisdiction.

The suit concerns alleged blasting operations that caused vibrations in the air and earth and created dust rendering living in the houses uncomfortable and possible impairment of health, whereby the plaintiffs' properties were reduced in market and rental values.

The first matter for consideration is what law applies as a guide to determine the controversy—whether the law of Tennessee or the law of Georgia or federal law.

The answer to this seems to be clear. In such cases the law of the forum applies. *Potomac Mill. & Ice Co. v. Baltimore & O. R. Co.*, 217 Fed. 665; *Peyton v. Desmond*, 63 C.C.A. 651, 129 Fed. 1. Even without the authorities, it would be plain that the law of the forum governs because the question is jurisdictional rather than simply venue. This, of course, is assuming that a local action is being discussed. It is elemental that local actions must be instituted in the state [or county, if a state court] where the *res* is located. Thus, there can be no waiver of the place of trial as could be done if it were only venue. The mandate of the law requires a local action to be tried locally. If anyone interested prefers to believe that the question is one of venue, there will be no objection for the result is the same.

Actually it is of no concern whether Tennessee, Georgia or federal law applies as they are all the same.

Federal: *Livingston v. Jefferson* (1811, CC) 1 Brook 203, F Cas No. 8411 [a *cause celebre* and a landmark case.

Ellenwood v. Marietta Chair Co. (1895) 158 U.S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771.

Georgia: *Leslie v. Gregg Lumber Co.* (1937) 184 Ga 794, 193 SE 763, 113 ALR 932.

Tennessee: *McCormick v. Brown* (1956) 201 Tenn. 166.

Also see annotations, 42 ALR, pages 196 et seq and 30 ALR 2d, page 1219, §2.

In any event, the issue presents substantive law and the *Erie*[1] doctrine governs the question. Actually, even before *Erie*, the courts generally recognized that the law of the state in which the federal court sat governed this question.

One is tempted to write quite a treatise on this interesting issue, but the law in Tennessee is so plain that it is unnecessary to discuss the history behind the Tennessee decisions.

McCormick v. Brown (1956)
201 Tenn. 166

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[1] Erie R. Co. v. Tompkins, 304 U. S. 64.

In fact this *McCormick* decision gives some of the history on the question as premise for the conclusion made. It is interesting to note that it appears that this Tennessee case was instituted by two of the plaintiffs in this case, John N. McCormick and wife, and concerned injury to their property from the blasting at the very stone quarry involved herein.

The *McCormick* case firmly establishes the law in Tennessee to be that an action for injury to real estate is local and if the real estate is located in another state Tennessee courts have no jurisdiction.

The opinion in the *McCormick* case points out the difference in the facts of certain other Tennessee cases where injuries to real property in another state were held to be personal actions. These other cases are relied upon by the plaintiffs but are not apropos.

The *McCormick* case in speaking of the difference between transitory actions and local actions has this to say:

> Therefore, under any theory that may be taken of the declaration in this case, since the act or omission and the injury both occurred in the State of Georgia, the action must be held to have been local and not transitory, as the same is defined in the case of *Mattix v. Swepston*, 127 Tenn. 693, 155 S.W. 928, which definition was taken from the case of *Livingston v. Jefferson, supra*, which definition is that the actions are transitory where the transactions on which they are founded might have taken place anywhere, but are local where the cause is in its nature, necessarily local.

This announcement conforms to the general definition

revealing the distinction between local and transitory actions as stated in 21 C.J.S. Courts § 39, page 48:

> Where a cause of action can arise in one place only, the action is local; but if the cause of action is one which might arise anywhere the action is transitory.

There is some argument that the request for an injunction would create jurisdiction *in personam*. However, Tennessee law has settled this question. *Brown v. Dayton Coal & I. Co.*, 3 Tenn. C.C.A. 395 [Higgins]. This *Brown* case firmly ruled that the Tennessee courts had no jurisdiction over an injunction suit to restrain trespassing over lands lying out of the state. To the same effect is Georgia law. *Leslie v. Gregg Lumber Co.*, 184 Ga 794, 193 SE 763, 113 ALR 932.

It is interesting to note that in the *Brown* case Justice Higgins departed from the severe criticism made by other courts on the rule of law announced herein by saying, "The experience of the ages has demonstrated the wisdom of this rule."

It should be added that the plaintiffs claim punitive damages and say that this prayer for such damages creates a transitory action. As there can be no punitive damages unless there are compensatory damages, it becomes plain that the rule of law herein announced would preclude the award of any exemplary damages and the action remains local.

Therefore, the conclusion is reached that the law of Tennessee governs the action of this Court in this case and that the law in Tennessee is that there is no jurisdiction in any court sitting in Tennessee to award damages for injury to real estate or to issue an injunction to prevent such injury where the real estate is situated

in another state.

The same conclusion would be reached under Georgia law or federal law.

The defendant's motion to dismiss is sustained.

LESLIE R. DARR
Leslie R. Darr
United States District Judge (ret.)

Appendix B

No. 16,834

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

HUBERT STILL, ET AL.,
Plaintiffs-Appellants,

v.

ROSSVILLE CRUSHED STONE COMPANY, INC.,
Defendant-Appellee.

On Appeal from the United States District Court, Eastern District of Tennessee, Southern Division.

Decided December 29, 1966.

Before: PHILLIPS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

PER CURIAM. Plaintiffs-appellants are residents of the State of Georgia and brought this action for damages to their Georgia residence properties and for an injunction restraining the defendant-appellee Tennessee corporation from doing certain acts in Georgia in the United States District Court for the Eastern District of Tennessee. Jurisdiction was based on diversity of citizenship, and plaintiffs-appellants have perfected this appeal from an order of the District Court dismissing the cause for lack of jurisdiction.

The learned District Judge properly held that the

doctrine announced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), under which the substantive law of a state was held to be controlling upon a federal court sitting therein, has application. Plaintiffs-appellants argue that the doctrine of *Erie Railroad Co.* does not have application because we are here concerned not with mere substantive law but with a jurisdictional issue, urging that no state by legislative action or judicial determination can destroy jurisdiction established by Congress or the Constitution. This argument makes it pertinent to point out the distinction between jurisdiction and venue. Jurisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, is intended for the convenience of the litigants. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); see also 1 Barron & Holtzhoff (Wright Ed.), §71. The power to adjudicate being here present, it becomes pertinent to determine whether under the law of Tennessee judicial authority could be there exercised over the subject matter of this cause.

In no situation could the law of the forum be more easily determined than here, since its law was recently established in a case involving two of the present plaintiffs-appellants seeking recovery for damages to a portion of the property alleged herein to have been damaged by blasting at the stone quarry at which the actions giving rise to the present cause occurred. [*McCormick v. Brown*, 201 Tenn. 166, 297 S.W. 2d 91 (1956)]. As stated by the District Court, "The *McCormick* case firmly establishes the law in Tennessee to be that an action for injury to real estate is local and if the real estate is located in another state Tennessee courts have no jurisdiction." See also *Livingston v. Jefferson*, 15 F. Cas. 660, 1 Brock 203 (1811), a landmark case of

identical concept, and *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895).

It being here determined that the law of the State of Tennessee is controlling and that such law requires the bringing of an action for injury to real estate in the jurisdiction wherein it is situate, it follows that the judgment of the District Court should be and it is affirmed.

SUPREME COURT, U. S.
FILED
MAY 4 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1173

HUBERT STILL, ET AL,
Petitioners,

v.

ROSSVILLE CRUSHED STONE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent is satisfied with the statement of counsel for petitioners as respects (1) OPINIONS BELOW and (2) JURISDICTION.

QUESTION PRESENTED

Respondent contends that the question presented is whether the United States District Court for the Eastern District of Tennessee, Southern Division, has jurisdic-

tion of a nontransitory local action seeking to recover money damages for injuries to land in Georgia and injunctive relief against the commission of a nuisance in the operation of a rock quarry in the State of Georgia.

CONSTITUTIONAL PROVISION

Respondent contends that no question involving the cited constitutional provision is presented.

STATUTES INVOLVED

Here the Petition for Certiorari deals with a venue statute of the United States (28 U.S.C. 1391(a)) which by its very terms fixes venue in a civil action, when it is founded on diversity of citizenship. In those cases the action must be brought where all the plaintiffs or defendants reside.

In actions for damages to real estate *quare clausum fregit* the action is strictly local and jurisdiction is therefore in the courts, state or federal, where the land lies.

FEDERAL RULES OF CIVIL PROCEDURE

The cited rules have no application.

STATEMENT OF THE CASE

The facts stated are correct.

ARGUMENT

(1) ***DECISIONS OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS FOLLOW THE DECISIONS OF THIS COURT. THE DECISIONS OF THIS COURT ARE NOT IN CONFLICT.***

The venue of the action is in the State of Georgia where the land lies. The Tennessee United States District Court has no jurisdiction.

One of the petitioners in this case, John H. McCormick, filed a suit in the Courts of Tennessee on a similar claim in 1956. The Supreme Court of Tennessee in ***McCormick v. Brown***, 201 Tenn. 166, ruled that the Courts of Tennessee had no jurisdiction of the controversy and that the action must be brought in the State of Georgia where the land lies. This decision controls this case. Under ***Erie v. Tompkins***, 304 U.S. 64 (1938), the U. S. District Court was required to apply the law of Tennessee.

The learned District Judge Darr (Page 17, Appendix A to Petition for Certiorari) pointed out that the Tennessee and Georgia law is the same and that the law in both states comports with the Federal Law as decided by this Court in ***Ellenwood v. Marietta Chair Company***, 158 U.S. 105, 39 L. ed. 913, 15 S. Ct. Rep. 771. The rule is so clearly stated by this Court in the ***Ellenwood*** case that the question is not debatable. It said:

> "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title of the possession of the land itself, is a local action, and can only be brought within the state in which the land lies."

As pointed out by the Sixth Circuit Court of Appeals (Page 22) jurisdiction is the power to adjudicate, while venue relates to the place where such judicial power will be exercised.

It is contended by petitioner that the decision of this Court in the case of *Wetmore v. Tennessee Copper Company*, 218 U.S. 369, 31 S. Ct. 84 (the opinion in *Ladew v. Tennessee Copper Company*, 218 U.S. 357, 365 (1910) being adopted) conflicts with the decision of this Court in *Ellenwood v. Marietta Chair Company*, *supra*, and therefore an important question is presented which requires the grant of certiorari.

The *Ellenwood* case, *supra*, involved an action in two counts; trespass to land, and the cutting and removing of timber therefrom, thus trespass and conversion were involved. The ruling of this Court was that the count, as respects the trespass, was a local action and therefore the suit could be brought only where the land lies. The further ruling was that as to the alleged conversion, the action might have been considered transitory. However, the petition was amended so as to allege in one single count a continuing trespass leaving the claim for conversion for timber cutting incidental only. The entire cause of action, said this Court, was local and the Circuit Court of the United States, sitting in Ohio, had no jurisdiction.

In the *Tennessee Copper Company* case, *supra*, Ladew, et al, citizens of New York and West Virginia, as the owners of timberlands in Georgia attempted to recover against the Copper Company for the destruction of their forests by fumes and gases coming from the copper smelting works of the New Jersey Corporation,

at Copperhill, Tennessee, by an action in the U. S. District Court for the Eastern District of Tennessee. Process was served on the Copper Company, a New Jersey corporation, and the Ducktown Sulpher and Iron Company, Limited, a British Corporation. The plaintiffs were citizens of New York and West Virginia. Because both defendants were non-resident corporations and because under the law (as it then existed) a suit founded only on the fact of diversity of citizenship between the parties could be brought only in the District of the residence of either the plaintiff or the defendant, it was contended that the U. S. District Court in Tennessee was without jurisdiction.

The plaintiffs responded to this contention with the claim that the U. S District Court in Tennessee had jurisdiction under a substituted service statute of the United States, providing that when any suit was commenced in a Circuit Court to enforce an equitable lien, or *claim to*, or to remove a cloud upon the title to real or personal property, and one of the defendants was a non-resident, constructive service could be obtained on such non-resident by publication. This Court ruled that such contention was without merit, and said that a suit to enjoin a trespass or obtain protection against the effect of a nuisance was not a "claim to" real property and therefore substituted service could not be perfected by publication and the District Court had no jurisdiction. *Wetmore's* case, *supra*, adopted the opinion of this Court in *Ladew's* case. It will be seen that there is an altogether different factual situation between the *Wetmore* and *Ellenwood* cases. The "conflict" alleged in the petition is non-existent.

(2) *NO INJUSTICE IS PRODUCED BY THE DECISION AND THE PETITIONERS HAVE A FULL AND COMPLETE REMEDY.*

The plaintiffs may sue the defendants in the Superior Court of Walker County, Georgia, where they have an office and a place of business, or they may file a suit in the United States District Court for the Northern Division of Georgia, Rome Division, based on diversity of citizenship.

Rossville Crushed Stone v. Massey, 219 Ga. 467, 133 S.E. 2d 874 (1963), did not hold that the suit would not lie in Georgia. The ruling was that the plaintiffs had failed to follow the State law and properly perfect service on the defendant as required by the Georgia Service Statute. The merits of the controversy have never been decided.

Livingston v. Jefferson, 15 F. Cases 660 (1811), a celebrated case in its day, was based on English law which drew a distinction between transitory and local actions. While the decision has been criticized and said to have been the "product of politics" (See Moore's Federal Practice, Vol. 1, Page 1466, Section 0.142(2-3)) and some states have refused to follow it, the majority of states have in fact followed the rule of law announced therein and Tennessee is one of those states.

(3) *THE JURISDICTION OF THE UNITED STATES DISTRICT COURT IS NOT CONTROLLED BY THE DECISION.*

The contention that the decision controls the jurisdiction of the United States District Court is without merit. The United States District Court for the Northern District of Georgia, Rome Division, has jurisdiction of the controversy.

The argument that "a United States District Court in the State of Georgia may not have power to adjudicate over the Tennessee corporation" is not sustained by any authority. Defendant, according to the complaint, maintains its place of business in the State of Georgia and is doing business in Georgia as a foreign corporation.

By virtue of Title 28, Section 1391(c), U.S.C.A., a corporation may be sued in any judicial district in which it is doing business.

(4) ***THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION WAS NOT VIOLATED BY THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.***

The cited case of ***Hughes v. Fetter***, 341 U.S. 609, 71 S. Ct. 980, has no application to the case at bar. In that case an action was brought in a State Court of Wisconsin to recover damages for the death of a person who was killed in the State of Illinois. Because the Wisconsin death Statute vested jurisdiction in State Courts only for deaths which occurred in that state, the State Court dismissed the suit and the Wisconsin Supreme Court affirmed. This Court granted certiorari because the local Wisconsin Statute violated the full faith and credit clause of the Federal Constitution, and (with four Justices dissenting) reversed. The case simply has no application here.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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